IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

A136641

HG11558324

JANE DOE
Plaintiff and Respondent,

v.

WATCHTOWER BIBLE & TRACT SOCIETY OF NEW YORK, INC.
Defendant and Appellant.

Appeal from the Superior Court of Alameda County
The Honorable Robert McGuiness, Judge

REPLY BRIEF OF APPELLANT, WATCHTOWER BIBLE & TRACT SOCIETY OF NEW YORK, INC.

WATCHTOWER BIBLE & TRACT SOCIETY OF NEW YORK, INC.,
Legal Department
Mario F. Moreno, Esq.
(*Pro Hac Vice*)
100 Watchtower Drive
Patterson, NY 12563-9204
(845) 306-1000

BOUDREAU WILLIAMS LLP
Jon R. Williams, Esq./162818
666 State Street
San Diego, CA 92101
(619) 238-0370

Attorneys for Defendant and Appellant,
WATCHTOWER BIBLE & TRACT SOCIETY
OF NEW YORK, INC.

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Defendant and Appellant, WATCHTOWER BIBLE & TRACT SOCIETY OF NEW YORK, INC. ("Watchtower"), hereby files this Reply Brief of Appellant in support of its request for reversal of: (a) the trial court's original Judgment following jury trial, entered on June 27, 2012; (b) the Amended Judgment entered on September 17, 2012; and (c) the trial court's related rulings of August 24, 2012, in favor of Plaintiff, JANE DOE ("Plaintiff" or "Candace"), on various post-trial motions. The co-Appellant to this appeal, North Fremont Congregation of Jehovah's Witnesses ("Fremont Congregation"), is filing a separate Reply Brief.

I.

INTRODUCTION

Plaintiff presented a nonfeasance liability claim to the trial court based on her argument that Watchtower and Fremont Congregation had a duty to warn and to protect her from abuse by rank-and-file congregation member Jonathan Kendrick ("Kendrick") when she was eight to ten years old. From the Amended Complaint through the punitive damages argument, Plaintiff built her nonfeasance theory of liability on Jehovah's Witnesses' Bible-based policy on confidentiality, which she mischaracterized as Watchtower's "policy of secrecy" that caused Watchtower and Fremont Congregation (collectively "Appellants") to fail to warn and protect her from Kendrick. Yet on appeal, Plaintiff's Respondent's Brief relegates to the background that same nonfeasance liability claim she argued to the jury, and presents in its place a new theory of liability centered on supposed *misfeasance* by Appellants.

In an effort to support this new misfeasance theory, Plaintiff's Respondent's Brief further twists and misrepresents trial testimony to propose that Fremont Congregation elders "repeatedly assigned" Plaintiff when she was nine years old to participate in "field service" (a personal religious activity) with "Jonathan Kendrick, a man known to them as a child molester."

Plaintiff's shift in theory from *nonfeasance* to *misfeasance* is improper and disingenuous because no witness at trial testified that *any* congregation elder ever assigned her to go in field service with Kendrick, much less that such assignments occurred "repeatedly." Instead, the witness who testified that she saw Plaintiff and Kendrick together in field service also testified that she never saw Plaintiff at a meeting for field service without at least one parent present. Moreover, although Plaintiff testified that she thought the elders predetermined the locations where groups of congregation members met for a meeting that preceded field service, those assignments were "just a paper on the board that the service meetings were scheduled and where they would be held." Even if the Fremont Congregation elders assigned Plaintiff and her parents to the same field service meeting location as Kendrick, that would not constitute accepting custody and control over Plaintiff or give rise to a duty to protect Plaintiff from Kendrick. Thus, although Plaintiff is not permitted to shift theories on appeal, that attempted shift fails anyway due to the state of the record below.

Accordingly, on Reply, Watchtower reiterates its challenges to the trial court's judgment and demonstrates many independent reasons for its reversal. Specifically, Watchtower first illustrates why (A) Plaintiff should not be allowed to change her theory of nonfeasance liability at trial, to misfeasance liability on appeal; and how (B) the record does not support misfeasance because there is no substantial evidence that any Fremont Congregation elder assigned Plaintiff to engage in field service with Kendrick. Watchtower next explains that contrary to Plaintiff's assertion, (C) Appellants' activities and their knowledge of Kendrick did not give rise to a general duty to protect Plaintiff from Kendrick. Watchtower then further demonstrates that (D) the trial court abused its discretion and erred as a matter of law in finding a special relationship between Appellants and Plaintiff; and (E) the trial court's reliance on *Rowland* was misplaced because our Supreme Court still requires a special relationship to create a duty in nonfeasance cases. Further, Watchtower discusses how constitutional rights were infringed upon when (F) the trial court targeted Appellants' Scripturally based beliefs, practices, and policies, and refused to allow the jury to allocate fault to others whose nondisclosure was responsible for Plaintiff's harm; and (G) improperly imposed upon Appellants a duty to protect with a duty to warn that required the jury to examine and evaluate Appellants' religious beliefs, practices, and policies. As Watchtower further demonstrates, (H) the trial court also erred when it sanctioned the labeling of a person as a sex offender without proof of a criminal conviction. Finally, with respect to punitive damages,

Watchtower illustrates how (I) there was insufficient evidence as a matter of law to show malice to support the award of punitive damages against Watchtower; and how (J) punitive damages were misused in an attempt to force Watchtower to change its nationwide policy as perceived by Plaintiff.

As Watchtower has maintained throughout these proceedings – both in this Court and the trial court – there is no question that child abuse is a horrible crime and sin against humanity. Watchtower has concern for all victims of child abuse, and that is why it has used its influence as a religious organization to be at the forefront of producing and distributing Bible-based educational materials, such as the *Watchtower* and *Awake!* journals, that raise the public's awareness about child sexual abuse and help families protect their children. Plaintiff deserves the deepest compassion, but there is no legal justification for her request that this Court allow fault for her sexual abuse to be placed upon Appellants. Indeed, this is *not* a case of child sexual abuse by a person who was in a position of leadership or authority within a church, as the perpetrator in this case, Kendrick, is merely a rank-and-file congregation member. Consequently, this Court should decline Plaintiff's invitation to contort the facts of this case to fit a paradigm in which they do not belong, and to establish a duty of care under the circumstances presented here.

Accordingly, Watchtower respectfully requests this Court to reverse the trial court's judgment. A reversal will preserve and uphold California's long-standing "no duty to protect rule," as well as Watchtower's constitutional rights, which are

protected by the Free Exercise and Establishment Clauses of the United States Constitution and their California counterparts.

II.

DISCUSSION

A. This Court Should Not Allow Plaintiff to Change Her Theory of Nonfeasance Liability at Trial to Misfeasance Liability on Appeal.

"It is a firmly entrenched principle of appellate practice that litigants must adhere to the theory on which a case was tried. Stated otherwise, a litigant may not change his or her position on appeal and assert a new theory. To permit this change in strategy would be unfair to the trial court and the opposing litigant." (*Hines v. California Coastal Com'n, Bd. of Supervisors of Sonoma* (2010) 186 Cal.App.4th 830, 846-847.) In derogation of that rule, Plaintiff's *misfeasance* theory for Appellants' liability on appeal differs dramatically from the *nonfeasance* case presented to the trial court. That sudden shift in focus reflects Plaintiff's apparent concern over the nonfeasance arguments raised in Watchtower's Opening Brief which expose the trial court's error in finding a special relationship between Appellants and Plaintiff that led it to impose a duty to protect and warn. (9 RT 1012, 1041, 1054-1055.)[1]

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[1] As with Watchtower's Opening Brief, all facts in this brief are supported by reference to the companion Appellants' Joint Appendix, abbreviated as: ([volume] AA [page]); the Reporter's Transcript, abbreviated as: ([volume] RT [page]); and the exhibits identified on the record and/or admitted into evidence in the trial court, abbreviated as ([Offering party] Exh. [number]).

Without seeking the court's permission to amend her pleading after presenting evidence at trial, Plaintiff now argues: "Assuming arguendo that defendants did not owe plaintiff an *affirmative* duty to protect or warn against Kendrick, the verdict should nevertheless be upheld on the basis of plaintiff's independent theory that defendants committed actual misfeasance by sending plaintiff into field service with Kendrick." (Resp. Brief, p. 27 [italics in original].) But in the proceedings below, Plaintiff pled that:

- Appellants "negligently supervised, managed and controlled defendant KENDRICK *in his membership and participation in the Fremont religious facility*, and negligently failed to warn plaintiff . . . and other members of the congregation, of the propensity and risk that . . . KENDRICK would sexually abuse and molest minor girls." (2 AA 503 [italics added].)

- Kendrick "continued to participate daily with other congregation members, including children and specifically including Plaintiff, in Jehovah's Witnesses activities including religious service and meetings, door to door solicitations, and study groups, and Congregation social events." (2 AA 505.)

- Appellants "were negligent in failing to exercise reasonable care to protect plaintiff . . ., and other minors, who were members of, or participants in, activities at the religious facility in Fremont, from the risk of sexual abuse or molestation by perpetrators, including . . . KENDRICK." (2 AA 503.)

- "Notwithstanding . . . their confirmed knowledge of KENDRICK'S recent molestation of at least one child, Elders Abrahamson and Clarke intentionally and purposely failed to notify or warn other FREMONT CONGREGATION members, including . . . parents of children active in the Congregation, . . . of the possible risk of further childhood sexual abuse by KENDRICK . . . Elders Abrahamson and Clarke intentionally kept secret . . . their confirmed knowledge of KENDRICK'S recent molestation of at least one child, from . . . parents of children active in the Congregation." (2 AA 505-506.)

Tellingly, Plaintiff never pled that Appellants, Elders Abrahamson or Clarke, or any other elder, committed misfeasance by sending or placing her in field service with Kendrick. (2 AA 501-507.) Instead, from Plaintiff's opening statement through post-trial motions – including her punitive damages argument – she repeatedly and consistently pressed a *nonfeasance* theory of liability based on Appellants' failure to warn and protect her from Kendrick. To that end, Plaintiff continually mischaracterized Jehovah's Witnesses' written, Scripturally based policy on confidentiality as being Watchtower's "policy of secrecy." (3 RT 89; 8 RT 955; 9 RT 1139; 9 RT 1180; 12 RT 1232; 13 RT 1265.) She also elicited testimony about "secrecy" and consistently argued to the court and jury that her purpose in bringing the lawsuit was to force Watchtower to "change this policy" of secrecy. (9 RT 1090; 12 RT 1231, 1233, 1240.)

Specifically, Plaintiff's opening statement asserted that elders who possessed knowledge of the single most important fact that would prevent abuse kept that fact secret from people in the congregation. (3 RT 90.) Plaintiff argued: "The governing body, through this policy, had made a determination that its own needs would be placed above protection of children and an indifference to children like Candace who were placed at risk by the presence of known sexual abusers within the congregations and the secrecy that surrounded it. That is what this case is about." (3 RT 98) When Plaintiff was confronted with the impeaching evidence of a secret deal she made with Kendrick that included not collecting money from him if awarded by the jury, she

again testified on re-direct that her objective in bringing suit was not to recover money, but was to change Watchtower's policy on confidentiality. (6 RT 736-737, 764.) Subsequently, during closing argument Plaintiff argued that Watchtower's "policy that keeps secret known child molesters . . . is wrong and needs to be changed" and "[t]hat's why we are here." (9 RT 1090-1091.) And during the punitive damages argument, Plaintiff argued that punitive damages were necessary to effect a change in Watchtower's "policy of secrecy which allows for an identified child sex offender to strike again." (12 RT 1231.)

However, the assertion presented as fact in the very first sentence of Plaintiff's Respondent's Brief – that "elders of defendant North Fremont Congregation . . . repeatedly assigned [Plaintiff] to participate with Jonathan Kendrick . . . in . . . 'field service'" – was never mentioned during Plaintiff's opening statement, her own testimony, her closing argument, or her punitive damages argument. Plaintiff's counsel did make a passing comment about misfeasance when the court was settling jury instructions, but even then, Plaintiff did not move the court for permission to amend her pleadings to conform to evidence adduced during trial. (See 8 RT 981.) Indeed, in response to Plaintiff's argument in support of proposed Special Jury Instruction No. 2 that there was evidence that the elders "sent" Kendrick into field service, the court responded that the evidence indicated Kendrick "was doing service" – not that he was *sent* into service. The court then elaborated that it would allow the jury to consider that evidence to determine breach, but *not* to impose a duty

of care. (8 RT 988.) Notably, Plaintiff's counsel did not object when the trial court denied Special Instruction No. 2. (9 RT 1006, 1010-1013, 1040.) Nor did Plaintiff offer rebuttal witnesses on that issue. (7 RT 941.) Further, Plaintiff has not cross-appealed the trial court's denial of any proposed jury instruction.

Now, on appeal, Plaintiff misrepresents the facts in an effort to create support for her new misfeasance theory. But those attempts to switch horses midstream from the nonfeasance case she presented to the jury should not be allowed. (*County of Los Angeles v. Southern California Edison Co.* (2003) 112 Cal.App.4th 1108, 1118, quoting 9 Witkin, Cal. Procedure [4th ed. 1997] Appeal, § 399, pp. 451-452.) To be sure, this Court should reject Plaintiff's unfair strategic change to a new theory that is pursued for the first time on appeal.

B. This Court Should Reverse the Trial Court's Judgment Because There Is No Substantial Evidence to Support Plaintiff's Assertion that Any Congregation Elder Assigned Plaintiff to Field Service with Kendrick.

In her statement of facts, Plaintiff contends that "there was plenty of evidence that in fact Candace *was* assigned to perform field service with Kendrick." (Resp. Brief, p. 14 [italics in original].) And in the argument section of her brief, Plaintiff further asserts that Kendrick "was assigned" to perform field service with her (Resp. Brief, pp. 26, 48), and that Appellants made Plaintiff's position worse "by assigning her to field service with a man they knew was a child molester." (Resp. Brief, p. 27.) Indeed, she now puts great weight on those alleged "facts." But this Court's careful

review of Plaintiff's citations to the record will confirm that there is no evidence of those key "facts" in the trial court record.

In fact, that record reveals that no witness testified that any congregation elder assigned Plaintiff and Kendrick to field service together. Moreover, any inference that any congregation elder assigned Plaintiff and Kendrick to field service together after 1993 calls for pure conjecture and cannot be substantiated on this record. Finally, no general duty of care arises from assigning Plaintiff's parents to the same field service meeting location as Kendrick, assuming *arguendo* such an assignment was even made after November 1993.

1. No Witness Testified that Any Congregation Elder Assigned Plaintiff to Field Service with Kendrick after November 1993.

The testimony that Plaintiff cites to support her new misfeasance theory, namely "6 RT 665, 666, 728" (Resp. Brief, p. 26) pertains to assignments to the *meeting locations* for field service and not to any assignment of *partners* for field service. As such, Plaintiff has provided no references or testimony to support her much different claim that Fremont Congregation elders *assigned* Kendrick and Plaintiff to perform field service together.

> Q. So if you were doing field service without either parent, how did you go?
>
> A. Usually, you know, we would have groups, groups that would go out. And it was kind of something that we had scheduled. I would go with somebody in the group.
>
> Q. And how would you know what group to be in?

A. Those were – *are you talking about the actual service meetings*?

Q. Yes.

A. *I think those were predetermined by the elders.*

Q. And how would you know *where to go* for your service, for *your field service* on any given day?

A. *Those were usually prescheduled.*

Q. And *who would tell you where to go*?

A. Well, in that room that I was talking about, usually *it was on the board.* Anything that was – you know, it was just *a paper on the board that the service meetings were scheduled and where they would be held.*

Q. And that was at the Kingdom Hall?

A. That was in the Kingdom Hall.

Q. How would you get to the Kingdom Hall if your dad wasn't going to go out in field service with you?

A. I would get a ride.

Q. Were there times that he dropped you off?

A. Yes.

Q. Were there times you would get a ride with someone else?

A. Yes.

Q. Were there times when you went out in the field service with Jonathan Kendrick but without either of your parents?

A. Yes.

Q. Did your abuse by Kendrick occur on some of these occasions?

A. Yes. (6 RT 727-728 [emph. added].)

Referring to the same *meeting locations* for field service, Carolyn Martinez ("Martinez") testified that "an elder or someone" would have assigned a member on where to go for a *meeting* for field service.

Q. Describe for us what field service is.

A. That's when we go off in pairs. They go off in pairs, and they go and knock on people's doors and they try to teach people the Bible. So that's field service.

Q. Does field service *start with a meeting somewhere*?

A. Yes.

Q. Where, back in the mid-1990s, did field service for the North Congregation usually start?

A. It depended on the day. It could be *at someone's house or it could be at the Kingdom Hall.*

Q. And how would people know where to go for field service?

A. Because you were *assigned* by the congregation *where* to go.

Q. Would there be *an elder or someone who would have made that assignment*?

A. Uh-huh.

Q. Is that a yes?

A. Yes.

Q. I'm sorry.

A. Sorry.

Q. That's okay. And you saw Jonathan Kendrick and Candace Conti together in field service?

A. Yes.

Q. And more than once?

A. Yes.

Q. And that was during the time that Candace was still living with her parents? They were married together?

A. Yes. (6 RT 665, 666 [emph. added].)

Plaintiff's Respondent's Brief cited to those excerpts to prove her missing critical "fact." (Resp. Brief, p. 26.) But those excerpts simply provide evidence that "an elder or *someone*" made the assignment on which *meeting location* (someone's home or at the Kingdom Hall) congregation members could go to *before they engaged in field service*. (6 RT 665, 666, 728.) Indeed, the cited testimony does *not* provide evidence that Fremont Congregation elders themselves assigned Plaintiff to field service with Kendrick. To be sure, no trial witness contradicted the direct testimony of individual Fremont Congregation elders that they did *not* assign Kendrick and Plaintiff to perform field service together either before or after November 1993 when they first learned of allegations of abuse against Kendrick. (See, *e.g.*, 3 RT 187, 248; 4 RT 420-422.)

Yet to support her newly minted misfeasance arguments on appeal, Plaintiff takes Martinez's bare trial testimony that she saw Plaintiff in field service with Kendrick and presents the following conjecture: (1) Plaintiff must have been alone with Kendrick when seen; (2) an elder (as opposed to "someone" else) must have assigned Plaintiff to work with Kendrick; (3) the assignment must have been made after November 1993; and (4) it must have been an elder, rather than Plaintiff's parents, who transferred custody of her directly to Kendrick. Had Plaintiff been

pursuing at trial that same theory of liability based on the Fremont Congregation elders "sending Plaintiff into field service with Kendrick," Plaintiff surely would have sought out more definitive evidence at trial to support that misfeasance theory. Indeed, Plaintiff could have simply testified that an elder assigned her to field service with Kendrick, if that were really the case. But there are compelling reasons why Plaintiff did not offer that simple and crucial testimony herself. . In short, the absence of that key evidence in the record to support a misfeasance theory only confirms that it never existed in the first place. (See *Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 808 ["The absence of critical evidence does not give rise to an inference that the missing evidence exists; rather, it indicates a failure of proof."].)[2] It was precisely for that reason that Plaintiff made the strategic decision to base her case at trial on a *nonfeasance* theory of Appellants' alleged failure to protect and warn instead.

2. The Jury Could Not Reasonably Infer from the Record as a Whole that a Congregation Elder Assigned Plaintiff to Field Service with Kendrick After November 1993.

As discussed above, the testimony cited in Plaintiff's Respondent's Brief lacks both support and context crucial to her misfeasance theory, including the identification of *when* she was allegedly assigned to field service with Kendrick. In contrast, Appellants' witnesses clearly placed their testimony concerning field

[2] Evidence Code section 412 requires the trier of fact to distrust the Plaintiff's weaker and less satisfactory evidence where stronger and more satisfactory evidence was readily available.

service assignments as being *after* November 1993, and confirmed they never made such an assignment. For example, Elder Clarke testified that after November 1993, Kendrick was *never* assigned to field service with a child, and that he absolutely would not have allowed it. (3 RT 248.) Elder Lamerdin similarly testified that after Kendrick was removed as a ministerial servant (in November 1993), he was *not* assigned to field service with children, including Plaintiff. (4 RT 420-421.) Elder Abrahamson also testified that he *never* assigned Kendrick to be with *any* child in field service, including Plaintiff. (3 RT 185-187.)

The trial court was obliged to accept the Fremont Congregation elders' testimony as fact because it was not only plausible, but *uncontradicted.* Thus, that testimony should have been "regarded as proof of the fact testified to, especially where contrary evidence, if it existed, would be readily available but was not offered." (*Am-Cal. Inv. Co. v. Sharlyn Estates, Inc.* (1967) 255 Cal.App.2d 526, 543.) Such evidence is also consistent with other undisputed evidence which demonstrated that Jehovah's Witnesses do not sponsor any activity that separates parents from their children. (See 3 RT 107-108, 140; 4 RT 277; 5 RT 495; 6 RT 705; 7 RT 874.) Moreover, the testimony from Plaintiff's own parents further corroborates the elders' testimony and strongly contradicts Plaintiff's unfounded conclusion that the Fremont Congregation elders directly assigned her to field service with Kendrick. Specifically, Plaintiff's father testified that when Plaintiff went to the Kingdom Hall, field service, or to any other Jehovah's Witnesses event, she was with

him and he never allowed her to go with Kendrick. (5 RT 482, 513.) Plaintiff's mother also denied that they ever dropped Plaintiff off at a meeting without one of them being with her. (4 RT 367-368.) Martinez similarly testified that she never saw Plaintiff come to the Kingdom Hall or field service without at least one of her parents. (6 RT 667-668.) In fact, Martinez's testimony on that issue was explicit. (6 RT 668 [Q. Did you ever see Candace Conti come to field service without one or both of her parents? A. No].) And although Martinez said she saw Plaintiff in field service with Kendrick, she did not state that they were *alone.* (6 RT 666.)

Finally, the fact that Plaintiff and Kendrick never went into field service alone was also corroborated by Plaintiff's own testimony: "Our groups would go out." (6 RT 728.)[3]

Even if this Court considers Plaintiff's new misfeasance theory of liability raised for the first time on appeal, a trier of fact could not have reasonably inferred from the record as a whole that a Fremont Congregation elder specifically assigned Kendrick to field service with Plaintiff after November 1993. It is a fundamental principal that one cannot make an inference from thin air:

> "Where there is no evidence or not even slight evidence of an essential fact to be proved by the plaintiff, a conclusion of a trial court or jury based thereon becomes mere conjecture and does not rise to the dignity of an inference." [Citation] The absence of critical evidence does not give rise to an inference

[3] Indeed, contrary to Plaintiff's trial testimony that she went out in service "in a group," Plaintiff now argues that she "was paired" with Kendrick. (Resp. Brief, p. 26.)

> that the missing evidence exists; rather, it indicates a failure of proof: "If the existence of an essential fact upon which a party relies is left in doubt or uncertainty, the party upon whom the burden rests to establish that fact should suffer, and not his adversary. [Citation]." (*Collin*, *supra*, 21 Cal.App.4th at 808.)

The evidence in the trial excerpts cited in Plaintiff's Respondent's Brief was that "an elder *or someone*" placed on a board at the Kingdom Hall a schedule of where groups met before participating in field service (6 RT 665, 666), and that one person saw Plaintiff and Kendrick together in field service. (6 RT 665, 666.) That testimony does not support a reasonable inference based on logic and reason that a Fremont Congregation elder specifically assigned Plaintiff and Kendrick to participate in field service together alone after November 1993. Indeed, when the whole record in this case is considered, it is clear that such an inference is contrary to direct testimony and is nothing more than rank speculation, meant to prop-up a theory of liability that Plaintiff did not even pursue at trial.

Had Plaintiff truly believed that the trial record supported a finding of misfeasance, she certainly would have moved to amend her Complaint to conform to that evidence and argued that issue to the jury. Her silence in that regard is a tacit admission that no such evidence exists upon which a jury, based on logic and reason, could reach such an inference. As such, this Court should eschew Plaintiff's new theory tactically raised here for the first time on appeal.

C. Appellants' Activities and Their Knowledge of Kendrick's Past Sexual Abuse Did Not Give Rise to a General Duty to Protect Plaintiff from Sexual Abuse by Kendrick.

Plaintiff next argues that Appellants' had a duty to protect her from sexual abuse by Kendrick which "arose from or occurred during church-sponsored events that their joint agents supervised" based on either a special relationship with Plaintiff or Kendrick, or upon "general principles of duty arising from a *Rowland v. Christian* analysis." (Resp. Brief, p. 47.) In reply, Watchtower adopts the arguments in Section II.D (below) concerning the lack of any special relationship in this case, and joins in the arguments of Fremont Congregation concerning the analysis of *Rowland v. Christian* (1968) 69 Cal.2d 108. (See Fremont's Reply Brief, Section IV; see also Rules of Court 8.200, subd. (a)(5).) Assuming *arguendo* that congregation meetings and field service are congregation-sponsored events, there is still no evidence that any of Plaintiff's sexual abuse occurred during such events. Instead, Plaintiff testified that she was sexually abused at Kendrick's home *after* Sunday congregation religious meetings. (6 RT 742-744.) Plaintiff also testified that Kendrick sexually abused her at his home *after* field service. (6 RT 728-731, 762.) She further testified that Kendrick sexually abused her on an Amtrak train while her father, Neal Conti, was present. (6 RT 745-746.)

Plaintiff also argues that Appellants are liable because "the elders brought a known child molester into association with Candace and failed to protect her." (Resp. Brief, 31.) However, as shown in Section II.B(1) and (2), *supra*, there is no

substantial evidence in the record to support Plaintiff's accusation that the elders placed Kendrick in field service with Plaintiff. To the extent Plaintiff argues that Kendrick's participation in field ministry and congregation meetings with other congregation members should give rise to a general duty for Appellants to protect Plaintiff, Watchtower again adopts the arguments in Section II.D (below) and joins in Fremont Congregation's arguments concerning the analysis of *Rowland v. Christian.* (Fremont's Reply Brief, Section IV.)

Again, it bears repeating that the undisputed testimony at trial was that neither Watchtower nor Fremont Congregation sponsored any activities that separated children from their parents, and neither created any position of access or trust with children. (3 RT 140; 4 RT 277, 321, 421; 5 RT 495, 547; 6 RT 705; 7 RT 873-876.) If, on a "rare" occasion, parents desired their child to participate in religious meetings or field service without them, one of the parents would need to make arrangements with someone else (*i.e.,* another parent) in the congregation to take them; in other words, parents do not just "drop [their children] off." (3 RT 186-187; 4 RT 437-438.) Regardless, dropping off a child does not negate a parent's duties as custodian. The Fremont Congregation elders had no duty to regulate whom Plaintiff's parents might have chosen to take Plaintiff to a meeting or to field service. Indeed, child abuse expert, Dr. Monica Applewhite, testified that she did not know of any mainstream religious organization that has ever attempted to regulate the access that parents provide to their own children. (7 RT 875-876.) Her testimony was not

disputed. Importantly, Dr. Applewhite further confirmed that she "would not recommend that as a risk management technique, to give the authority to make decisions about a child's interpersonal relationships over to the clergy versus allowing the parents to make those decisions for themselves." (7 RT 876.)

Additionally, the argument that Kendrick's participation in the field ministry and congregation meetings should give rise to a general duty for Appellants to protect Plaintiff closely mirrors Plaintiff's closing argument that likened Kendrick to "the vicious dog" that Watchtower let "run around." (9 RT 1112.) But what did the elders actually know about Kendrick at the time of Plaintiff's abuse in 1994 to 1996? They knew that in November 1993 Kendrick had confessed to touching the breast of his stepdaughter (3 RT 152-153), and they believed he had repented. (3 RT 157.)[4] It was not until 1998 that the elders even learned that Kendrick had been charged with a misdemeanor offense in 1994 for the incident with his stepdaughter. (3 RT 193, 251; 4 RT 307-308, 410.) And it was not until 2009 that the elders finally learned of Kendrick's 1994 to 1996 abuse of Plaintiff; they certainly never suspected any abuse at the time it was happening. (4 RT 274-275, 417, 420.) Thus, in 1994, the elders knew Kendrick was a repentant rank-and-file congregation member (3 RT 166, 241; 5RT 484; 7 RT 873, 880) who admitted to committing a single offense that could lead to criminal charges. They did not know Kendrick had been charged or convicted of a crime. They did not know that Kendrick was currently abusing a

[4] It is undisputed that the abuse, whatever the extent, occurred only once. (4 RT 296-298, 300-301, 342-343.)

child. And they did not place Kendrick in a position of access or trust with children. (7 RT 873-874.) But even if the elders had any knowledge about Kendrick's prior actions, Plaintiff's hyperbole, equating Kendrick with a "vicious dog," has no place in any serious consideration of the issues presented either below or here on appeal. Indeed, in *Eric J. v. Betty M.* (1999) 76 Cal.App.4th 715, 725, the court explained that a previously convicted child abuser may be the *moral* equivalent of a vicious dog, but for purposes of tort liability, equating a sex offender to "a brute beast without the capacity to repent, does not square with the parole scheme under which [the sex offender] was released." Rather, since the Legislature accepted the *possibility* of the offender's rehabilitation, his presence in society cannot be equated to an inanimate, dangerous condition or that of a dangerous animal. (*Ibid.*)

After Kendrick's 1994 conviction, the legislative scheme under which Kendrick was convicted permitted his freedom in the community despite the possibility of recidivism. As the *Eric J.* court explained, as a matter of public policy, the Legislature accepted a risk that must be "borne by the public" – and not by a targeted religious organization – that the statutory "rehabilitative effort will fail [in order] to gain the benefit that at least some parolees would be returned to a 'productive position in society.'" (*Eric J., supra,* 76 Cal.App.4th at 726.) Accordingly, this Court should determine as a matter of law that Appellants' activities and knowledge of Kendrick did not give rise to a general duty for Appellants to protect Plaintiff from Kendrick.

D. The Trial Court Erroneously Found That a Special Relationship Existed Between Appellants and Plaintiff Sufficient to Substantiate a Broad Duty of Care.

Although Plaintiff quotes only Fremont Congregation's attack on the court's factual determination (Resp. Brief, p. 27), Watchtower's Opening Brief succinctly stated: "In short, the trial court clearly erred when it incorrectly determined, as a matter of law, that a special relationship existed between Watchtower and Plaintiff." (Watchtower's Opening Brief, p. 30.) Fremont Congregation joined in that argument. (Fremont Opening Brief, p. 11.) Thus, both Appellants challenged the sufficiency of factual evidence together with the trial court's legal basis for finding a special relationship and imposing a broad duty to protect Plaintiff, as "[a] special relationship is a prerequisite for liability based on a defendant's *failure to act*" (nonfeasance). (*Garcia v. Superior Court* (1990) 50 Cal.3d 728, 734.)

Yet Plaintiff maintains that she enjoyed a special relationship with Appellants because "there was substantial evidence that defendants exerted custody and control over [her] by assigning her to perform field service with Kendrick." (Resp. Brief, p. 28) But, as discussed in Section B, *supra*, there is no "substantial evidence" that congregation elders ever assigned Plaintiff to perform field service with Kendrick after November 1993. Nor is it logical that assigning a *family* to a meeting location constitutes taking "custody" of a child of that family. Consequently, Plaintiff has presented no substantial evidence to support a finding that Appellants ever took custody and control over her.

Instead, Plaintiff testified that she would "get a ride" from someone if her parents were not going to participate in field ministry. (6 RT 728.) Accepting that statement as true, it was Plaintiff's parents, not Appellants, who relinquished their custody and control of Plaintiff to the person who allegedly provided her transportation. (3 RT 145-146.) If Plaintiff's parents permitted Kendrick to pick her up or take her in field service, then it was her parents who transferred custody to Kendrick, not the Fremont Congregation elders. (3 RT 187.)

But perhaps more broadly, it is significant that no reported case in California has found that a special relationship exists between a church and a church member to protect against harm from other church members. Instead, on at least two prior occasions, California appellate courts have found that no special relationship exists between a church and a church member. (See *Roman Catholic Bishop of San Diego v. Superior Court of San Diego County* (1996) 42 Cal.App.4th 1556, 1568; *Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 269, 270.)

Plaintiff's attempts to distinguish *Richelle L.* because it does not involve a minor plaintiff are unavailing. (Resp. Brief, p. 31.) That case clearly analyzes and discusses the relationship between a church and its members, and after doing so, properly held that church membership alone does not generate a special relationship. The facts here are even more attenuated in that *Plaintiff was not even a congregation member; she was the child of congregation members and she participated in congregation activities with her parents.* (5 RT 481; 7 RT 911-912.)

Moreover, it remains undisputed that Appellants did not have any positions of access or trust with children. Nor did they sponsor any schools, camps, or other youth-oriented activities that separated children from their parents. (3 RT 107-108.) Nevertheless, Plaintiff claims that a special relationship existed based upon *Pamela L. v. Farmer* (1980) 112 Cal.App.3d 206. (Resp. Brief, p. 30.) However, the facts in *Pamela L.* are clearly inapposite. There, the appellate court that examined the pleadings on a challenge of demurrer accepted as true statements that the defendant wife knew five crucial facts: (1) her husband had a criminal record for sex offenses against both female adults and children; (2) her husband was inviting young girls to the house to swim while she was at work; (3) her husband would be alone with the girls if they accepted the invitation; (4) her husband intended to commit sexual acts with the children; and (5) her husband would cause serious injury to the girls if she did not warn the children, their parents, or the police. (*Id.* at 208.) Despite knowledge of those specific facts, the defendant wife encouraged parents to allow their children to visit and swim, and she assured the parents that their children would be "perfectly safe." (*Id.* at 209.)

On those admitted facts, the *Pamela L.* court found that the defendant wife "did not merely fail to prevent harm" but she assured the parents that it was safe for their children to play at her house, encouraged and invited the children, and prepared refreshments to entice the children to come. (*Pamela L., supra,* 112 Cal.App.3d at 209-210.) Analyzing respondent wife's liability, the *Pamela L.* court further

observed that the "harm occurred at respondent's home, [was] committed by a person having a close relation to respondent," and that "plaintiffs were expressly invited by respondent." (*Id.* at 211.) Based upon those unique facts, the *Pamela L.* court found misfeasance.

But the unique facts of *Pamela L.* do not exist here. In contrast, the Fremont Congregation elders had far less information about Kendrick, a congregation member, than the defendant wife in *Pamela L.* had about her husband and his criminal record of sexual offenses against women and children. Moreover, the elders did not make any affirmative assurances to Plaintiff's parents that their child would be safe or encourage Plaintiff's parents to give up the custody and control of their child, as did the defendant wife in *Pamela L.* Instead, the undisputed evidence shows that the elders in this case:

- Found out in November 1993 only that Kendrick admitted to touching his 13-year-old stepdaughter's breast once in the privacy of his own home (3 RT 138-139, 151-153, 177, 180-181, 183, 207, 210-211, 214-217, 219-222, 239-240, 250-251; 4 RT 297, 301-302; 7 RT 879-880) and that Mrs. Kendrick and her daughter had agreed to forgive him and continue to live together as a family. (3 RT 156, 243; 4 RT 296-297.)

- Deleted Kendrick as a ministerial servant and announced his removal to the congregation in December 1993, which was shortly after they learned of his sexual abuse of his stepdaughter in November 1993. (3 RT 163, 166, 241; 5RT 484; 7 RT 880.)

- Did not know until 1998 that Kendrick was charged and convicted of a sex crime in 1994. (3 RT 193, 251; 4 RT 307-308, 410.)

- Told Kendrick he should not be alone with and not get close to children. (3 RT 250; 4 RT 420.)

- Believed Kendrick was complying with their instructions not to be alone with or get close to children. (3 RT 162, 171, 195-196, 248-249, 253; 4 RT 417, 420-421.)

- Believed that Kendrick was repentant and would not commit additional sexual acts with children. (3 RT 191, 203.)

Clearly, the facts in this case are far-removed from being a "situation that mirrors *Pamela L.*," as Plaintiff asserts. (Resp. Brief, p. 30) As such, *Pamela L.* does not support the court's finding of a special relationship between Appellants and Plaintiff.

Plaintiff conversely argues that Appellants also had a special relationship with Kendrick and were therefore obligated to control his criminal behavior. (Resp. Brief, p. 27.) But the trial court did *not* find the existence of any special relationship between Appellants and Kendrick. Rather, the trial court's finding of a special relationship was limited to Plaintiff and Appellants. (9 RT 1012.) Additionally, when the court denied Plaintiff's Special Jury Instruction No. 2 (which pertained to duty in the context of Kendrick's involvement as a volunteer), Plaintiff did not object. (9 RT 1010.) Accordingly, Plaintiff's argument that Appellants "took charge of Kendrick" (Resp. Brief, p. 30) is now moot, and Plaintiff should be foreclosed from asserting that a special relationship existed between Kendrick and Appellants.[5]

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[5] Assuming *arguendo* that Plaintiff can assert on appeal that there was a special relationship between Kendrick and Appellants, Plaintiff has not pointed to substantial evidence in the record to support a finding that Appellants took charge of or had the ability to control Kendrick, a rank-and-file congregation member who was not their employee or agent.

For the foregoing reasons, Watchtower reprises its request that this Court find that the trial court's creation of a special relationship between Plaintiff and Appellants was an error of law.

E. The Court's Reliance on *Rowland* Was Misplaced As the California Supreme Court Still Requires a Special Relationship to Create a Duty in Nonfeasance Cases.

Relying on this court's opinion in *Juarez v. Boy Scouts of America* (2000) 81 Cal.App.4th 377, Plaintiff makes the statement that "[m]any recent authorities argue that the special relationship duty analysis should be eliminated completely in favor of the traditional duty analysis set forth in *Rowland v. Christian* (1968) 69 Cal.2d 108." (Resp. Brief, p. 33.) But, regardless of what recent authorities "argue" should be done – or may yet be done – the doctrine of *stare decisis* obliged the trial court to follow the decisions of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.) In that regard, the High Court made clear in *Garcia, supra,* 50 Cal.3d at 734, that the existence of a special relationship is an essential "prerequisite" in a nonfeasance case. Other Supreme Court cases decided after *Rowland* only confirm that the special relationship doctrine continues to be the prerequisite for establishing a duty based on a party's nonfeasance.[6]

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[6] See, *e.g., Delgado v. Trax Bar and Grill* (2005) 36 Cal.4th 224, 235 ["as a general matter, there is no duty to act to protect others from the conduct of third parties"]; *Morris v. De La Torre* (2005) 36 Cal.4th 260, 269 [same]; *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1129, quoting *Davidson v. City of*

Relying on *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 877 & fn. 8, Plaintiff nevertheless claims that "[t]he *Rowland* factors are also appropriately applied to determine duty in cases of third party institutional liability involving child sexual abuse." (Resp. Brief, p. 34) But *C.A. v. William S. Hart Union High School Dist.* does not support finding a duty to protect based on the *Rowland* factors *absent* a special relationship. Rather, in that case, a minor plaintiff sued his public high school guidance counselor and the school district for damages arising out of sexual harassment and abuse by the counselor. The plaintiff alleged that the school district was liable for negligence because its administrative personnel knew, or should have known, of the counselor's propensities but they nevertheless hired, retained, and inadequately supervised her. (*Id.* at 865.) The High Court noted that "a school district and its employees have a special relationship with the district's pupils, a relationship arising from the mandatory character of school attendance and the comprehensive control over students exercised by school personnel, 'analogous in many ways to the relationship between parents and their children.' [Citations.]" (*Id.* at 869.) Thus, the Court held: "Because of this special relationship . . . the duty of care owed by school personnel includes the duty to use reasonable measures to

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Westminster (1982) 32 Cal.3d 197, 203 ["'[a]s a general rule, one owes no duty to control the conduct of another, nor to warn those endangered by such conduct'"]; *Nally v. Grace Community Church of the Valley* (1988) 47 Cal.3d 278, 293; *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 435.

protect students from foreseeable injury at the hands of third parties acting negligently or intentionally." (*Id.* at 870.)[7]

Clearly, the duty to protect the minor plaintiff (a school student) in the *C.A.* case was based on the existence of a special relationship, and was *not* based on a *Rowland* analysis. Having found that the school district had a duty to protect students, the Supreme Court then pointed out that it was appropriate to use the *Rowland* analysis to "decide the *scope* of duty arising from a special relationship." (*C.A., supra,* 53 Cal.4th at 877, fn. 8 [italics added].) As such, Plaintiff's argument that *Rowland* supports the imposition of a duty to protect her puts the proverbial cart before the horse. Without a special relationship, there is no duty to protect Plaintiff and a *Rowland* analysis is therefore inapplicable.

Accordingly, Watchtower renews its request for this Court to find that the trial court's reliance on *Rowland* to impose a duty to protect or warn Plaintiff was misplaced. The California Supreme Court has consistently held that a special relationship is a prerequisite to the creation of a duty in a nonfeasance case. Plaintiff has provided no basis for this Court to hold otherwise.

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[7] The High Court also held that the school district could be vicariously liable for its agents' negligent supervision of children on school grounds under section Government Code section 815.2, subd. (a).

F. The Trial Court's Refusal to Allow the Jury to Allocate Fault to Others Responsible for Plaintiff's Harm Targeted Appellants' Religious Beliefs, Practices, and Policies on Confidentiality in Violation of the Free Exercise Clause of the United States Constitution and its California Counterpart.

Plaintiff references the substantial evidence standard of review for rulings rejecting claims of confidentiality and privilege. (Resp. Brief, p. 39) But this is not the proper standard of review for the duty and constitutional issues raised on this appeal. The question of whether Appellants' religious tenets should have been submitted as part of the jury instructions for negligence requires *de novo* review by this Court. (See *Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1129.) This is especially true where those instructions impermissibly intrude upon constitutionally protected activities or interests. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6 [reviewing court's task is to determine *de novo* whether there is a reasonable likelihood the jury applied the trial court's remarks or instructions in an unconstitutional manner].)

The Free Exercise violation alleged by Watchtower is linked to the trial court's refusal to allow the jury to allocate fault to other persons. Watchtower's argument is that the trial court improperly excluded other persons and entities from sharing any responsibility for the harm claimed by Plaintiff, and in the process, targeted Appellants' Bible-based religious beliefs, practices, and policies on confidentiality, in violation of the Free Exercise clauses of the United States and California constitutions. (Watchtower's Opening Brief, pp. 36-44)

1. Sufficient Evidence Was Presented for the Trial Court to Allow the Jury to Allocate Fault to Governmental Entities and the Plaintiff's Parents.

Plaintiff contends that the evidence was insufficient to allow the jury to allocate fault to governmental entities or to Plaintiff's parents for the harm she suffered. (Resp. Brief, p. 53.) She therefore argues that the trial court acted properly in *not* allowing the jury to allocate fault to the governmental entities because "there was no evidence that any public entity had any relationship at all with Candace or her parents or that they placed her in Kendrick's custody." (Resp. Brief, p. 57.) Plaintiff thus concludes that "[t]he trial court properly observed that under these circumstances imposing a duty on law enforcement agencies would be 'incredibly burdensome.'" (Resp. Brief, p. 57.) But neither Watchtower nor the Fremont Congregation had a direct relationship with Plaintiff either; she was simply the child of parents who were members of the Fremont Congregation. (5 RT 481; 7 RT 911.) More importantly, the trial court's imposition of a duty to warn or protect Plaintiff was at least as burdensome upon Appellants as it would have been for the police, CPS, and the Alameda County District Attorney ("District Attorney"), all of whom had superior knowledge about Kendrick's 1993 sexual abuse of his stepdaughter and his subsequent criminal conviction. In contrast, Appellants knowledge was limited to spiritual counseling sessions with the Kendrick family. (3 RT 214-216) On the other hand, the government entities conducted an investigation, brought formal charges against Kendrick, and knew in March of 1994 that Kendrick had been convicted of a

misdemeanor for molesting his stepdaughter. Fremont Congregation elders would not learn of that charge and conviction until 1998. (3 RT 193, 251; 4 RT 307-308, 410.)

Further, the governmental entities had greater expertise and resources than did Appellants to protect Plaintiff from sexual abuse by Kendrick. Nevertheless, Plaintiff attempts to justify the trial court's refusal to allow allocation of fault to those governmental entities based on two well-trodden assertions: (1) Fremont Congregation elders assigned Plaintiff and Kendrick to perform field service together; and (2) Appellants had a special relationship with Plaintiff and Kendrick. (Resp. Brief, p. 58) But as explained in sections II.B and II.D, *supra*, neither of those assertions are supported by the law or the record in this case.

Plaintiff also argues that Watchtower's reliance on *Bly-Magee v. Budget Rent-A-Car Corp.* (1994) 24 Cal.App.4th 318, is misplaced because the plaintiff in that case claimed he was assaulted while in the care and custody of officers and agencies, which gave rise to a special relationship and hence a duty. (Resp. Brief, p. 58.) But Plaintiff misunderstands Watchtower's reliance on *Bly-Magee*. Watchtower does not rely on *Bly-Magee* to argue that the court should have found a special relationship between the governmental entities and Plaintiff. Watchtower relies on *Bly-Magee* to support its argument that it would have been appropriate for the trial court in this case to simply include "other persons" on the verdict form, namely the governmental entities who investigated, charged, and convicted Kendrick, as well as Plaintiff's

parents, who had custody and control of Plaintiff. This would have allowed Appellants to argue to the jury that it could allocate some fault for Kendrick's sexual abuse of Plaintiff to the governmental entities that failed to do the very same things that Plaintiff alleges Appellants failed to do (*i.e.,* keep a watchful eye on Kendrick and inform parents that Kendrick was a known child molester) and to Plaintiff's parents for their failure to protect Plaintiff. In other words, to the extent that Plaintiff was attempting to pin liability on Appellants in the absence of a special relationship, she could not be heard to complain that such liability could be allocated to other parties who also did not have such a relationship with Plaintiff. But by allowing that verdict to proceed only against Appellants, the trial court singled-out for special treatment a religious organization based upon its free exercise of its religious tenets. This it could not do. (See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993) 508 U.S. 520, 534.)

Plaintiff also argues that "a prima facie case against parents for failing to protect their child against abuse by a third party requires proof of *actual* unambiguous knowledge of the perpetrator's assaultive propensities." (Resp. Brief, p. 54 [Italics in original].) But none of the authorities cited by Plaintiff for this proposition discuss a parent's duty to protect their child. As discussed in Section II(E), *supra,* our Supreme Court imposed liability in *C.A., supra,* because the teacher-student exception to the no-duty rule, derives from school personnel standing in *loco parentis, i.e.,* "in the place of a parent . . . taking on all or some of the responsibilities

of a parent." (Black's Law Dictionary 803 (8th ed. 2004).) Logically, if a school incurs an affirmative duty because it accepts a parent's responsibilities, then *a fortiori*, parents also have the same affirmative duty to protect their own children.

Moreover, a parent's duty to protect their child based on statute and common law does not require actual knowledge of a perpetrator's propensities. (See Cal. Welf. & Inst. Code § 300; *Williams v. Garcetti* (1993) 5 Cal.4th 561, 570, 572 (adopting Rest. 2d Torts, § 316) [a special relationship exists between parent and child]; Pen. Code § 272, subd. (a)(2) [parents must "exercise reasonable care, supervision, protection, and control over their child"]; *Curry v. Superior Court* (1993) 20 Cal.App.4th 180, 187-188 ["one purpose of the parental liability laws is to encourage responsibility in parents – that is, to encourage parents to exercise effective control over their children"].) In other words, simply because Plaintiff recalls being "dropped off" does not relieve her parents of the responsibility to make specific, further arrangements for her care. Elder Abrahamson testified that in the event parents could not participate in an activity with a child, they would make arrangements for somebody else from the congregation to care for their child. Parents "don't drop them off." (3 RT 145-146, 186-187.)

But even assuming *arguendo* that such actual knowledge is required before imposing upon parents a duty to protect their child, this would not preclude the jury from finding Plaintiff's parents negligent based on their own misfeasance. (*Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40, 48-49.) Specifically, the jury here could

have found Plaintiff's parents negligent for regularly placing their eight- to ten-year-old daughter in a grown man's (Kendrick's) exclusive custody after Sunday congregation religious meetings, and for allowing him to take her to his home where Plaintiff said he sexually abused her. (6 RT 742, 744) The jury could also have found Plaintiff's parents negligent for placing Plaintiff in Kendrick's custody so that he could take her alone to congregation meetings and field service, after which Plaintiff said he sexually abused her. (6 RT 728-731, 762.) And certainly Plaintiff's parents could be found at fault for Kendrick's abuse of Plaintiff on a train when she was accompanied by both her father and Kendrick, who were both drinking alcohol. (6 RT 745-746.)

2. It Is a Violation of Appellants' Religious Beliefs, Practices, and Policies for Congregation Elders to Disclose to Congregation Members Information Learned During Spiritual Counseling.

Plaintiff also argues that the trial court's imposition of a duty to warn parents that Kendrick was a known child molester did not violate Appellants' religious beliefs and practices on confidentiality because the "evidence demonstrated without contradiction that the report of Kendrick's sexual abuse of Andrea was not received in confidence and was not intended to be confidential." (Resp. Brief, p. 39) In support of that conclusion, Plaintiff asserts that the report of Andrea's abuse came from Andrea and Evelyn Kendrick; neither of them testified that the report was in the context of religious-based counseling or a confidential communication; they wanted the elders to do something to stop Kendrick and protect them; and they went to the

police. (Resp. Brief, p. 39-40.) Plaintiff also asserts that the congregation elders reported the abuse to the Legal and Service Departments of Watchtower, shared information with other congregation elders, and that Elder Abrahamson admitted that the elders would have shared the information with parents had they observed Kendrick getting too close to a child. (Resp. Brief, p. 40-41) In making that assertion, however, Plaintiff confuses the issue of what is a privileged communication under civil law with what is a confidential communication based on a religious organization's Bible-based religious beliefs and practices.

A careful reading of the record to which Plaintiff cites makes it obvious that it does not support Plaintiff's argument. None of the testimony that Plaintiff cites states that it would *not* have been a violation of Appellants' Bible-based religious beliefs, practices, and policies on confidentiality for an elder to disclose the information received in confidence from Kendrick's family to congregation parents. In contrast, the undisputed testimony from the congregation elders and Watchtower's representatives clearly supports Watchtower's claim that the elders' disclosure of information received in confidence from Kendrick, Evelyn, and Andrea would have violated Appellants' Bible-based beliefs, practices, and policies on confidentiality. (See Watchtower's Opening Brief, p. 42.)

For First Amendment purposes, Watchtower's argument is that the matter was confidential under church beliefs, church policy, and church practice. Moreover, as a matter of California law, clergy were not mandated reporters until January 1997.

(See Stats. 1996, ch. 1081 (A.B. 3354), § 3.5 [amending Pen. Code § 11166, effective January 1, 1997].) Thus, to require congregation elders to disclose confidential information when no civil law of general and neutral applicability required disclosure violated Appellants' First Amendment rights.

Nothing in the cases relied upon by Plaintiff compels a different result. For example, neither the facts nor the holding of *Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 Cal.App.4th 417 ("*RCALA*") support Plaintiff's argument that the congregation elders' communications with the Kendrick family were not confidential, and thus the trial court did not violate Appellants' free exercise of religion. In *RCALA,* the grand jury issued judicial subpoenas for the production of personnel and medical records of priests who had been accused of child molestation. The Catholic Church argued that disclosure of the documents was barred by the First Amendment. (*Id.* at 424-425.) The *RCALA* court held that the assertion of First Amendment rights does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability and it does not bar the disclosure of documents. (*Id.* at 431-432.) Consequently, it held that the federal Free Exercise clause did not relieve petitioners of the obligation to comply with the basis for California's grand jury process, which was a valid and neutral law of general applicability. (*Id.* at 434.) Disclosure was also not barred by the Establishment Clause because the primary effect of enforcing the subpoenas would not require the state either to interfere with the internal workings of the archdiocese or to choose

between competing religious doctrines. (*Id.* at 434.) Further, documents made in the course of "troubled-priest interventions" were not privileged as penitential communications under Cal. Evid. Code § 1032. (*Id.* at 444.)

Those findings do not bear on this case, which does not center on a criminal investigation. Indeed, Appellants do not challenge the constitutionality of a criminal grand jury order to disclose confidential church records pursuant to a preexisting grand jury subpoena process. Instead, this case concerns whether information that church elders believed was confidential according to internal church policies and procedures based on Scripture should have been disclosed without any statutory requirement or judicial order compelling its disclosure. Thus, Appellants challenge a civil court's *retroactive imposition* of a duty to warn and to protect Plaintiff which necessarily would have required voluntary disclosure of confidential information in violation of Bible-based religious beliefs and practices on confidentiality. Again, unlike the grand jury subpoena process in *RCALA* that was neutral and generally applicable (*Id.* at 434), there was no existing law here that required Appellants to warn or protect Plaintiff. In addition, the retroactive duty imposed on Appellants was not neutral and generally applicable law because the trial court refused to allow the jury to allocate fault to the governmental entities that had superior knowledge and resources available to warn and protect Plaintiff.

Similarly misplaced is Plaintiff's reliance on *In re the Clergy Cases I* (2010) 188 Cal.App.4th 1224 ("*Clergy Cases*") (Resp. Brief, p. 42) to support her contention

that the trial court did not violate Watchtower's free exercise of religion rights. In *Clergy Cases,* friars in Santa Barbara had sexually abused 54 victims since 1958. Plaintiffs identified 41 child-abusing clergy who were transferred to, or allowed to live in, Santa Barbara at various times since 1960. (*Id.* at 1235.)

Here, there was one alleged perpetrator (Kendrick) who was not in any position of leadership or authority. (7 RT 873, 878.) He was a rank-and-file congregation member. (9 RT 1061.) There are no facts that suggest either of the Appellants attempted to transfer him, or any other perpetrator, to conceal past sexual abuse of children. More importantly, the issue in *Clergy Cases* was the individual friars' privacy rights, not the free exercise of their religion. That the court would order the disclosure of the individual friars' psychiatric records is hardly surprising where "all citizens have a compelling interest in knowing if a prominent and powerful institution has cloaked in secrecy decades of sexual abuse revealed in the psychiatric records of counselors who continued to have intimate contact with vulnerable children while receiving treatment for their tendencies toward child molestation." (*Id.* at 1236.) Consequently, in *Clergy Cases,* there was no issue over whether the court's ruling was based on a neutral and generally applicable law, as there is in this case.

Plaintiff also cites *Reynolds v. United States* (1878) 98 U.S. 145, and *New York v. Ferber* (1982) 458 U.S. 747, for the proposition that child molestation, like polygamy and child pornography, is not protected by First Amendment religious

protection. (Resp. Brief, p. 43.) But *Reynolds* and *Ferber* are clearly inapposite. Appellants abhor the practice of child abuse (3 RT 223; 7 RT 915-916) and do not challenge the constitutionality of existing criminal laws that are neutral and generally applicable. Appellants argue that their right to refrain from conduct that violates their religious beliefs, practices, and policies on confidentiality is protected by the Free Exercise Clause, absent an overriding neutral law of general applicability. This is entirely different than claiming that Kendrick's criminal activity was similarly protected, as Plaintiff's straw man argument clearly suggests.

In short, the trial court violated Appellants' rights as protected by the Free Exercise Clause of the First Amendment of the United States Constitution because its rulings and jury instructions on duty and allocation of fault targeted religion and were under-inclusive, while being neither neutral nor narrowly tailored.

G. The Trial Court's Imposition Upon Watchtower of a Duty to Protect with a Duty to Warn Required the Jury to Examine and Evaluate Appellants' Religious Beliefs, which Infringed Upon Appellants' Constitutional Rights Protected by the Establishment Clauses of the United States and California Constitutions.

Whether Appellants' religious tenets should have been submitted as part of the jury instructions for negligence requires *de novo* review by this Court. (See *Board of Administration*, *supra*, 52 Cal.App.4th at 1129.) This is especially true where those instructions impermissibly intrude upon constitutionally protected activities or interests. (*Victor*, *supra*, 511 U.S. at 6 [reviewing court's task is to determine *de*

novo whether there is a reasonable likelihood the jury applied the trial court's remarks or instructions in an unconstitutional manner].)

Watchtower's Opening Brief argued that "the jury in this case was allowed to inquire into whether the Appellants properly adhered to their own religious tenets and beliefs in *not* warning the Plaintiff or other congregation members about Kendrick's prior sexual abuse of his stepdaughter. Thus, the trial court in this case impermissibly injected an examination of the beliefs, practices, and internal government of Jehovah's Witnesses . . . in violation of Appellants' First Amendment rights. (See *Serbian Eastern Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696, 709.)" (Watchtower Opening Brief, p. 46 (Italics included))

Without citing any authority, Plaintiff simply responds that "[a] defendant's obligation to warn or protect children against molestation by a known child abuser involved in activities sanctioned or sponsored by the defendant is secular, neutral, and not based on religious doctrine. . . . It does not require a jury to interpret religious doctrine or evaluate religious beliefs." (Resp. Brief, p. 43) Plaintiff is wrong. Indeed, the trial judge even commented that the jurors would "talk about what weight [to] give the scriptures and the nature and context of how the information was delivered." (6 RT 750.) This Court should conclude, as a matter of law, that the trial court's evaluation and examination of Appellants' religious tenets was an inquest that the trial court should have carefully avoided and that its failure to do so requires

reversal of the trial court's judgment. (See *Nally v. Grace Community Church of the Valley* (1988) 47 Cal.3d 278, 293, 298-299.)

H. Labeling a Person as a Sex Offender Without Proof of a Criminal Conviction Would Violate that Person's Constitutional Rights to Privacy, Liberty, and Due Process.

As discussed above, whether a constitutional violation results from government action presents a question of law for this Court's *de novo* standard of review. (See *Board of Administration*, *supra*, 52 Cal.App.4th at 1127-1129.)

Plaintiff's Respondent's Brief argues that compelling social interests in the disclosure of information relating to sexual predators of children outweigh constitutional privacy interests. (Resp. Brief, pp. 44-45.) Again, Plaintiff overstates her case. A notification scheme based upon anything less than a criminal conviction would result in some citizens being stigmatized based on false or erroneous allegations. (*Humphries v. County of Los Angeles* (9th Cir. 2009) 554 F.3d 1170, 1186, revd. on other grounds (2010) 131 S.Ct. 447.) Here, the trial court imposed a duty to warn on Appellants as a result of information far below the standard of a criminal conviction. In fact, the elders only had information obtained during confidential spiritual communications with the Kendrick family. In November 1993 neither Kendrick's wife, Evelyn, nor his stepdaughter, Andrea, had yet reported the offense to the police. The Fremont Congregation elders are not law enforcement officers and they were not commissioned to conduct investigations of accusations of behavior that could be criminal in nature. Their role as congregation elders was to

assist the family spiritually. They went to the Kendrick home with Bibles in hand to listen to, provide Scriptural counsel to, and pray with members of the Kendrick family. (3 RT 180-181, 214-215; 4 RT 301-302.) Based upon those confidential spiritual communications, the elders advised Evelyn and Andrea that they had the right to report the incident to the police, which they did in 1994. (3 RT 169, 241; 4 RT 302-303.) A professional criminal investigation by the police, not by congregation elders, resulted in the district attorney filing criminal charges. (4 RT 303, 305; 6 RT 646-648.) Eventually, Kendrick was convicted of a misdemeanor. (4 RT 307.)

After that conviction, why did those governmental agencies not label Kendrick as a sex offender and post notices all over the community? Yet, the trial court's decision imposed on Appellants not only a duty to label Kendrick *prior to any criminal charges or conviction*, but also to broadcast that label to all congregation members. But what if Andrea later recanted or minimized[8] her accusation, or the account had been proven false, as was the case in *Humphries*, where a rebellious 15-year-old teenager[9] stole her father and stepmother's car, ran away to her mother's

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[8] Plaintiff's expert Carl Lewis testified that one of the five categories associated with Child Sexual Abuse Accommodation Syndrome is "retraction." According to Mr. Lewis, it is common for an abuse victim to convincingly "take back" or "minimize" the facts as originally reported. (5 RT 460-461, 469-471.)

[9] As Plaintiff points out in her Statement of Facts, 13-year-old Andrea used "[the incident] as a tool to threaten [her parents] when she wants something." (Resp. Brief, p. 10.) At that time, Andrea apparently was rebelling against her parents' efforts to "enforce house rules covering her comings and goings." (8 AA 1992.)

home, and then falsely accused her father and stepmother of child abuse? (*Id.* at 1175.) As a result of false accusations, the Humphries' other children were forcibly taken by governmental agencies and placed in foster homes, starting an eight-year litigation nightmare before they were taken off the central registry. (*Id.* at 1180-1183.)

What steps would the elders have to take to remove the stigma from Kendrick's name if the information received by the elders about Kendrick's offense did not result in a criminal conviction notwithstanding any suspicion that he was guilty of child abuse? No such rule of law required Appellants to take such action here.

I. There Was Insufficient Evidence that Watchtower Acted with Malice to Support Plaintiff's Punitive Damages Claim.

The parties agree that the "substantial evidence" standard is the proper measure to determine whether a punitive damages claim should have been submitted to the jury. The dispute concerns whether there was "substantial evidence" that Watchtower acted with sufficient malice to support such extraordinary damages. In undertaking that review, an appellate court need not blindly seize any evidence in order to affirm the judgment. Indeed, the Court of Appeal was "not created . . . merely to echo the determinations of the trial court." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 652.)

As noted in Plaintiff's Respondent's Brief, malice is defined as "despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Resp. Brief, p. 60, quoting Civ. Code § 3294, subd. (c)(1).) "An award of punitive damages against a corporation . . . must rest on the malice of the corporation's employees." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167.) But a corporation avoids punitive damages for the acts of its "low-level employees which does not reflect the corporate 'state of mind' or the intentions of corporate leaders." (*Ibid.*) Thus, section 3294 requires that the complained of behavior "must be on the part of an officer, director, or managing agent of the corporation." (Civ. Code § 3294, subd. (b).)

The employee must be "sufficiently high in the corporation's decision-making hierarchy to be an 'officer, director or managing agent.'" (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 63.) The term "managing agent" includes "only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 566-567.) "'[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz, supra*, 83 Cal.App.4th at p. 167-168.) It is not enough that the individual has the ability to hire or fire employees to qualify as a

managing agent, rather, he must have "substantial discretionary authority over decisions that ultimately determine corporate policy." (*White*, *supra*, 21 Cal.4th at 573.)

Plaintiff's brief acknowledges that "Plaintiff claimed malice based [only] on the failure to warn about Kendrick." (Resp. Brief, p. 63.) The court's conclusion quoted in Plaintiff's brief confirms that the finding of malice resulted from Watchtower's "decision not to disclose [and] imperil the safety of each child in a small congregation and thoroughly undermine [Watchtower's] teachings and understanding of child molesters and the methods of dealing with them as reflected in their writings distributed to the congregants on a national basis." (*Ibid.*)

Watchtower's conduct for which this punitive damages claim was based must be measured against what an officer, director, or managing agent of Watchtower knew and did after November 1993, when notified that Kendrick had improperly touched his stepdaughter. When Fremont Congregation elders Clarke and Abrahamson, who were not managing agents of Watchtower, learned that Kendrick had improperly touched his stepdaughter, they sought legal advice from attorneys at the Watchtower Legal Department and Scriptural direction from elders in the Watchtower Service Department on how to handle the situation with both the civil authorities and within the congregation. (3 RT 153-154, 246.) It is undisputed that at the time, in November 1993, California's mandatory reporting law did *not* require ministers to report allegations of sexual abuse, and this did not change until

January 1, 1997. (See Stats. 1996, ch. 1081 (A.B. 3354), § 3.5 [amending Pen. Code § 11166, effective January 1, 1997].)[10]

Fremont Congregation elders provided spiritual guidance and assistance to the Kendrick family and advised Evelyn Kendrick and Andrea that they had a right to report Kendrick's improper touching to law enforcement, which they later did in February 1994. (3 RT 163-164, 180-181, 190-191, 239-242, 250-251; 4 RT 302-303; 6 RT 707; 7 RT 880.) The Watchtower Service Department thereafter expressed agreement with the congregation elders' recommendation to remove Kendrick as a ministerial servant. (3 RT 163, 166, 192, 218, 241, 244, 247; 7 RT 880.) And in December of 1993, the Fremont Congregation elders announced Kendrick's removal as a ministerial servant to the congregation. (3 RT 241, 244; 5RT 484; 7 RT 880.) By that announcement, Kendrick was also no longer considered to be a member in good standing; he was placed on restrictions while the elders tried to help him recover a good relationship with God. (3 RT 166.) Furthermore, subsequent to Kendrick's admission in November 1993, he was never placed in a position of responsibility in the congregation, but simply remained a member of the congregation. (3 RT 166, 243-244; 7 RT 916.)

[10] To that end, the trial court expressed its intent to "clean up the record" if the testimony of any expert indicated that ministers or clergy were mandated reporters. (8 RT 978-979.)

Thus, if California law did not require the elders to disclose the matter to law enforcement in November 1993, the question has to be asked how their alleged failure to disclose the same incident to all other congregation members by virtue of an open announcement of what Kendrick had confessed to can amount to substantial evidence of malice by Watchtower. Similarly tenuous is the proposition that Appellants can be accused of acting with malice because consistent with the Scripturally based religious beliefs and practices of Jehovah's Witnesses, they did not announce the reason for Kendrick's removal as a ministerial servant to the congregation. (3 RT 222-223, 243-244.)

One highly contested issue before the trial court concerned what the members of the Kendrick family told the elders about Kendrick's misconduct. (See p. 20, *supra*, including footnote 4.) That dispute aptly demonstrates the wisdom of having civil courts rather than ecclesiastical courts determine guilt. It also demonstrates the wisdom of the Legislature's mandatory reporting laws, all of which require that reports of child abuse be made to trained secular authorities, and not that an announcement be made to a congregation. By adhering to that law and acting on the limited information they acquired in their spiritual counseling of the Kendrick family, there is simply no substantial evidence that Appellants acted with the requisite malice to support punitive damages. Again, it is undisputed that Fremont Congregation elders and Watchtower did not become aware that Kendrick had pled guilty to misdemeanor child abuse until 1998, well after Plaintiff's abuse had concluded. (3

RT 193, 251; 4 RT 307-308, 410.) Assuming *arguendo* that Kendrick's misdemeanor conviction for child abuse placed a duty upon Watchtower and the Fremont Congregation to warn the congregation that Kendrick was a known child molester, any such duty to warn the congregation based upon Kendrick's criminal conviction would not have arisen until 1998, at the earliest.[11]

A duty to warn, if any, should not attach to religious organizations without a criminal conviction of a congregation member in a court of law and the registration of an individual as a sex offender. Otherwise, this Court would encourage ecclesiastical tribunals to be set up (with varying standards from one religious organization to another), and then be later reviewed by the civil court system to determine whether a congregation member's propensity to reoffend poses a sufficient threat to merit a widespread warning to other members. This simply cannot be the standard for substantial evidence of malice under California law, especially when Appellants' decision to not warn was based on their understanding of Bible scriptures on confidentiality.

The most Plaintiff can point to, then, is Appellants' July 1, 1989, letter, which she alleges was not meant to provide Scriptural direction, but was instead meant to promote Appellants' own monetary interest in avoiding legal liability for damages.

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[11] Notably, even in entertaining that argument, it is important to remember that Kendrick's conviction of misdemeanor child abuse, by itself, is not sufficient as a matter of law to put the congregation on notice that he was a "known child molester" because the misdemeanor child abuse statute does not require registration as a sex offender. (Penal Code § 290.)

(Resp. Brief, p. 62.) But even if Plaintiff's arguments were plausible in the context of corporate policies, they fail to establish malice without also delving into Appellants' Scripturally based religious policies which required that internal communication in the first place. (See *Nally, supra*, 47 Cal.3d at 298, 299; see also *Serbian Eastern Orthodox Diocese, supra,* at 709-10; *Watson v. Jones* (1871) 80 U.S. 679, 733.)[12]

The consideration that Plaintiff promotes as a secular examination of Watchtower's Bible-based policy on confidentiality, in reality amounts to a "pretext inquiry" that improperly undermines religious autonomy. By allowing Plaintiff to mischaracterize the July 1989 letter as a corporate "policy of secrecy," the trial court improperly invited the jury to evaluate "the real reason" for Watchtower's conduct as a means for finding sufficient malice. Doing so was improper, and cannot form the basis for the jury's substantial punitive damages award. (*Hosanna-Tabor*

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[12] *See also Elvig v. Calvin Presbyterian Church* (9th Cir. 2004) 375 F.3d 951, 959 [it is not the court's role "to determine whether the Church had a secular or religious reason" for conduct]; *Odenthal v. Minn. Conf. of Seventh-Day Adventists* (Minn. 2002) 649 N.W.2d 426, 436 ["As a statement of the church's policy regarding pastoral counseling, the Minister's Handbook poses a serious risk of religious entanglement for a court attempting to discern its limits, however. Thus, Odenthal must state a cause of action in negligence by reference to neutral standards and not by reference to the Minister's Handbook."]; *Franco v. Church of Jesus Christ of Latter-day Saints* (Utah 2001) 21 P.3d 198, 203 [Under 'excessive entanglement' analysis, civil tort claims requiring courts to review and to interpret religious doctrine and practices are barred by the first amendment.]; *Miller v. Catholic Diocese of Great Falls* (Mont. 1986) 728 P.2d 794 [refusing to examine a religious school's discipline policy and evaluate a teacher's interpretation and application of policy in violation of the First Amendment].)

Evangelical Lutheran Church & Sch. v. EEOC (2012) 132 S.Ct. 694, 715-716 (conc. opn. of Thomas, J.).)

In short, the fact that the Appellants did not make a public announcement to the members of the Fremont Congregation in November 1993 that Kendrick had sexually abused his stepdaughter is not substantial evidence of malice by Watchtower. The Fremont Congregation elders followed the California reporting law as it existed at the time and there was no law that required that Appellants provide notification to the congregation. Further, the elders advised Kendrick's wife and stepdaughter that they could report the alleged abuse, which they did. And absent actual knowledge that Kendrick had become a registered sex offender after being convicted in a court of law, the Appellants' decision, based on their understanding of Scriptures on confidentiality, not to warn cannot be construed as substantial evidence of malice by Watchtower. For those fundamental reasons, the jury's punitive damage award against Watchtower should be reversed.

J. The Punitive Damages Award Was Excessive Because the Plaintiff Invited the Jury to Use the Award to Change Watchtower's Alleged National "Policy of Secrecy."

Furthermore, as Watchtower argued in its Opening Brief and reiterates here, the punitive damages awarded by the jury was excessive as a matter of law because it includes an award for *harm to others*, not to just the Plaintiff. (See Watchtower's Opening Brief, pp. 59-61.) Watchtower pointed to decisions such as *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, *State Farm Mut. Auto Insurance Co. v.*

Campbell (2003) 538 U.S. 408, and *Philip Morris USA v. Williams* (2007) 549 U.S. 346, to show that the Constitution's Due Process Clause does not allow a state to use a punitive damages award to punish a defendant for injuries that may have been inflicted on nonparties.

Yet Plaintiff's Respondent's Brief acknowledges Plaintiff's intention to involve nonparties from the beginning of her case when she refers to her Amended Complaint as alleging "negligent failure to protect plaintiff *and other minors* participating in religious activities at the Congregation." (Resp. Brief p. 22; see also 2 AA 503.) Indeed, Plaintiff testified repeatedly that the purpose of this lawsuit was to change Watchtower's alleged "policy of secrecy" so that "children would be protected." (6 RT 764-765.) Plaintiff's counsel further argued the same thing in his opening statement, and in his arguments to the jury about punitive damages. (3 RT 88-90; 9 RT 1090-1091.) In fact, during closing arguments, Plaintiff's counsel specifically emphasized the July 1, 1989, letter and noted that "the Body of Elder Letter must be followed by every elder in every congregation throughout the country with no power, no discretion to deviate whatsoever." (12 RT 1232.)

This was not simply a tangential reference to an alleged national policy, as Plaintiff now contends in an attempt to minimize the scope of her trial court arguments. Rather, those statements show that the Plaintiff specifically asked the jury to consider how Watchtower's Bible-based policies impacted children throughout the country, with Plaintiff further inviting the jury to issue an amount of

punitive damages which would change that same alleged national "policy of secrecy."

Plaintiff relies on *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191 to argue that it is proper to "recognize a state's legitimate interest in punishing or deterring a defendant whose national policy or practice harms a state resident; accordingly, admission of evidence of national policies on the issue of reprehensibility is obviously proper." (Resp. Brief, p. 66.) But *Johnson* is inapposite here because Plaintiff did not seek to argue that Appellants' conduct in other jurisdictions had actually harmed anyone else and therefore was higher on the reprehensibility scale. In fact, she did not introduce any evidence of reprehensibility as it related to any other alleged victim of Appellants' supposed "policy of secrecy." Instead, Plaintiff pursued her nonfeasance case by repeatedly and consistently arguing to the trial court and jury that she wanted to change Watchtower's nationwide Bible-based policy on confidentiality. (9 RT 1090-1091; 12 RT 1231, 1233, 1240) She further testified that her purpose in suing Watchtower was not to recover money, but was to change the policy on confidentiality. (6 RT 736-737, 764) And during the punitive damages argument, Plaintiff specifically argued that punitive damages were necessary to effect a change in Watchtower's "policy of secrecy which allows for an identified child sex offender to strike again." (12 RT 1231) Thus, rather than using extraterritorial conduct to demonstrate reprehensibility in this case, Plaintiff did just the opposite: she asked the jury for a higher punitive damages award so as to prevent

extraterritorial harm from occurring in the first place. This the Plaintiff could not do. (See *Philip Morris USA, supra,* 549 U.S. at 353 [clarifying that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties . . . *i.e.,* injury that it inflicts upon those who are, essentially, strangers to the litigation"].) Accordingly, this Court should vacate the jury's punitive damages award improperly calculated on that basis.

K. Watchtower Complied with the Rules of Court.

Plaintiff's argument that Watchtower prejudiced its appeal by violation of court rules (see Resp. Brief, pp. 69-70) deserves no response other than a blanket denial to avoid acquiescence. (See *H. Moffat Co. v. Rosasco* (1953) 119 Cal.App.2d 432.)

III.

CONCLUSION

Based upon the foregoing, Watchtower respectfully requests this Court to reverse all aspects of the Judgment and Amended Judgment rendered in this matter by the trial court, and to direct that a new judgment be entered in Watchtower's favor on all of the Plaintiff's claims. Alternatively, Watchtower asks this Court to order that a new trial be held on those claims and that the trial court be required to supply complete and accurate instructions on duty, allocation of fault, and mandatory reporting.

Respectfully submitted,

WATCHTOWER BIBLE & TRACT SOCIETY OF NEW YORK, INC., LEGAL DEPARTMENT
Mario F. Moreno, Esq.
(*Pro Hac Vice*)

BOUDREAU WILLIAMS LLP

Date: 02/29/13

Jon R. Williams, Esq.
Attorneys for Defendant/Appellant
WATCHTOWER BIBLE & TRACT SOCIETY OF NEW YORK, INC.

CERTIFICATE OF COMPLICANCE PURSUANT TO THE CALIFORNIA RULES OF COURT, RULE 8.204(c)

Pursuant to the California Rule of Court, Rule 8.204, subd. (c), I certify that the foregoing brief is proportionally spaced, has a typeface of 13 points, is double-line spaced, and based upon the word count feature contained in the word processing program used to produce this brief (Microsoft Word 2010), contains 13,977 words.

Date: 08/29/13

Jon R. Williams

Jane Doe v. The Watchtower Bible and Tract Society of New York Inc. et al.
Court of Appeal of the State of California
First Appellate District, Division Three
Court of Appeal Case No.: A136641
Alameda County Superior Court Case No.: HG11558324

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

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Richard J. Simons, Esq. Kelly I. Kraetsch, Esq. Furtado Jaspovice & Simons 6589 Bellhurst Lane Castro Valley, CA 94552	*Attorney(s) for Plaintiff and Respondent: Jane Doe*
James M. McCabe, Esq. The McCabe Law Firm, APC 4817 Santa Monica Avenue, Suite B San Diego, CA 92107	*Attorney(s) for Defendant and Appellant: Fremont California Congregation of Jehovah's Witnesses, North Unit*
Hon. Robert McGuiness Alameda County Superior Court 1221 Oak Street, Dept. 22 Oakland, California 94612	*Trial Court*
Supreme Court of California 350 McAllister Street San Francisco, CA 94102 **Brief via electronic submission**	*Supreme Court*

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Executed on **August 30, 2013**, at San Diego, California.

Chenin Andreoli

Chenin M. Andreoli